THE CO-OPERATIVE CENTRAL BANK LIMITED (IN RECEIVERSHIP)

v.

FEYEN DEVELOPMENT SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD. EUSOFF CHIN CJ
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATUK WIRA WAN YAHYA PAWAN TEH FCJ
[CIVIL APPEAL NO. 02-519-1993]
28 SEPTEMBER 1995

COMPANY LAW: *Loans to director - Prohibition against company providing security therefor - Section 133(1) Companies Act 1965 - Transactions entered in violation of section - Legal effect - Whether capable of giving rise to civil consequences - Whether necessarily void and unenforceable - Effect of subsection (5) on transactions - Companies Act 1965 s. 133(1), (4) & (5).*

INTERPRETATION: *Statutes - Statute providing penalty for offences - Construction - Principles - Whether to be given a purposive approach - Prohibited transactions - Whether totally devoid of legal effect - Companies Act 1965 s. 133(1) & (5).*

The appellant co-operative society had granted a loan to its member, one Lim Kon Kwee, who was also a director of the respondent company. Section 133(1) of the Companies Act 1965 (the Act) forbids a company such as the respondent from providing security for loans taken by its directors from third parties. The section, by its subsection (5), however, does not *"prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section"*. The prohibition in subsection (1) notwithstanding, the respondent had guaranteed the loan to its said director, and in the event, had created two separate charges in favour of the appellant as security.

Upon default committed by the respondent under the charges, the appellant applied for orders of sale of the charged property. The respondent, in an apparent attempt to avoid repaying the loan and to get back its property free of the charges, filed proceedings and prayed for declarations that the loan and the charge transactions were illegal, void and unenforceable, having breached s. 133(1) of the Act. The trial Judge held for the respondent and consequently ruled both transactions to be void and unenforceable in law. The appellant appealed and before the Federal Judges the main issues that arose were:

1. Whether upon the validity of the loan and charge transactions herein, civil consequences would flow from a breach of s. 133 of the Act.

2. Whether the trial Judge, in coming to the decision he did, had failed to give due consideration to s. 133(5) thereof.

Held: Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] Section 133(1) does not in term say that a guarantee entered into or any security given in contravention thereof is to be void although it would result in the imposition of criminal liability on the official of the company, and on the company itself, by virtue of the general penalty provisions contained in ss. 369(1)(a) and 369(2) of the Act. However, although the general rule is that such a contract is void and unenforceable, it is a question of construction whether the statute intends to prohibit such contract in the sense of

rendering it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.

[2] Section 133(5) of the Act seems to have recognised the principle, expounded in *Victor Battery Co. Ltd v Curry's Ltd* [1946] Ch. 242, that a charge of a company's assets was valid and enforceable although it was given as security for a loan to the company. It is arguable thus that sub-section (5) implies that notwithstanding that a guarantee or security given by a company has contravened subsection (1) thereof, the company may still incur civil liability under it, in which case it will have a right of resource against the borrower/ director.

[3] The Court will not lend its aid to enable the chargor respondent to take advantage of its own default by relying on its own breach to avoid the charge transactions and thereby escape its obligations thereunder, unless this is what the clear language of the statute is thought to require.

[4] Section 133 is designed to protect the company, its shareholders and creditors from unlawful dissipation of its resources and ought to be given a purposive approach. To admit the defence of illegality to a commercial transaction of the present sort, however, would defeat such purposive interpretation, as it would not only defeat the chargee society's application to enforce the charges by way of an order for sale, but would provide "a windfall gain" to the chargor company and others in a similar position. Such a result would impose substantial hardship upon the chargee society.

[5] Having regard to the context and purpose of s. 133(1), and also the principle underlying s. 133(5) of the Act, a breach of sub-section (1) of s. 133 does not have the result contended for by the respondent company. It follows that even accepting that the charge transactions herein did breach s. 133(1) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to the loan or the charge transactions. The learned Judge below had clearly failed to take into account the true purport of s. 133(1), or the principle inherent in s. 133(5), and his judgment, as a result, cannot stand.

[Appeal allowed. Charges allowed to be enforced and Court below ordered to grant prayers sought for by the appellant including prayers for sale of the property].

[**Bahasa Malaysia** Translation of Headnotes]

UNDANG-UNDANG SYARIKAT: *Pinjaman kepada pengarah-pengarah - Larangan terhadap syarikat memberikan jaminan baginya - Seksyen 133(1) Akta Syarikat 1965 - Transaksi yang dimasuki melanggari seksyen - Kesan undang-undang - Samada berkeupayaan untuk membangkitkan akibat-akibat sivil - Samada semestinya menjadi tak sah dan tidak boleh dikuatkuasakan - Kesan seksyen kecil (5) ke atas transaksi - Akta Syarikat 1965 s. 133(1), (4) & (5).*

PENTAFSIRAN: *Statut-statut memperuntukkan penalti bagi kesalahan - Pentafsiran - Prinsip - Samada harus diberikan pendekatan bertujuan - Transaksi dilarang - Samada tidak mempunyai kesan undang-undang - Akta Syarikat 1965 s. 133(1) & (5).*

Persatuan koperatif perayu telah memberikan pinjaman kepada ahlinya, seorang yang bernama Lim Kon Kwee, yang juga merupakan seorang pengarah syarikat responden. Seksyen 133(1) Akta Syarikat 1965 (Akta tersebut) melarang sesebuah syarikat seperti responden daripada memperuntukkan jaminan bagi pinjaman yang telah diambil oleh pengarah-pengarahnya daripada pihak ketiga. Seksyen tersebut, melalui seksyen kecil

(5)nya, walaubagaimanapun, tidak *"menghalang syarikat daripada mendapatkan semula jumlah apa-apa pinjaman atau jumlah bagi yang mana ianya bertanggungan di bawah mana-mana jaminan yang dimasuki atau berhubung dengan apa-apa jaminan yang diberikan bertentangan dengan seksyen ini."* Sekalipun dilarang oleh seksyen kecil (1) responden telah menjamin pinjaman kepada pengarahnya yang tersebut di atas, dan berikutnya, telah mewujudkan dua gadaian yang berasingan atas nama perayu sebagai jaminan.

Setelah berlaku kemungkiran oleh responden di bawah gadaian-gadaian tersebut, perayu telah memohon untuk mendapatkan perintah-perintah untuk penjualan hartanah yang tergadai itu. Responden, dalam percubaannya untuk mengelakkan diri daripada membayar-balik pinjaman dan juga untuk mendapatkan semula hartanahnya bebas daripada gadaian-gadaian tersebut, telah memfailkan prosiding dan memohon pengisytiharan bahawa transaksi-transaksi pinjaman dan gadaian tersebut adalah tak sah, batal dan tidak boleh dikuatkuasakan di sisi undang-undang. Perayu telah merayu dan di hadapan Hakim-hakim Persekutuan isu utama yang berbangkit adalah:

1. Samada di atas keesahan transaksi-transaksi pinjaman dan gadaian tersebut di sini, tindakan-tindakan sivil akan berbangkit daripada kemungkiran s. 133 Akta tersebut.
2. Samada Hakim perbicaraan, dalam mencapai keputusannya, telah gagal memberikan pertimbangan yang wajar kepada s. 133(5).

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Seksyen 133(1) tidak mengatakan bahawa sesuatu gerenti yang dimasuki atau apa-apa jaminan yang diberikan yang berlanggaran dengannya adalah batal walaupun ianya akan mengakibatkan pengenaan tanggungan jenayah ke atas pegawai syarikat tersebut, dan ke atas syarikat itu sendiri, menurut peruntukan-peruntukan penalti am yang terkandung dalam seksyen kecil 369(1)(1) dan 399(2) Akta tersebut. Namun begitu, sungguhpun kontrak yang sedemikian adalah secara umumnya batal dan tidak boleh dikuatkuasakan, ianya adalah merupakan persoalan pentafsiran samada statut tersebut berniat untuk melarang kontrak yang sedemikian dalam ertikata menjadikannya batal dan tidak boleh dikuatkuasakan, atau samada ianya berniat hanya untuk mengenakan penalti yang diperuntukkan dibawahnya jika kontrak sedemikian dibuat atau dilaksanakan.

[2] Seksyen 133(5) Akta tersebut mengiktiraf prinsip-prinsip yang diterangkan dalam *Victor Battery Co. v. Curry's Ltd* [1946] Ch. 242, bahawa gadaian aset-aset syarikat adalah sah dan boleh dikuatkuasakan walaupun ianya telah diberikan sebagai jaminan bagi pinjaman kepada syarikat tersebut. Ianya dengan itu boleh dihujahkan bahawa seksyen kecil (5) menunjukkan bahawa tanpa menghiraukan bahawa gerenti atau jaminan yang diberikan oleh sesebuah syarikat telah melanggari seksyen kecil (1), syarikat tersebut masih boleh mengalami tanggungan sivil dibawahnya, dalam mana ianya mempunyai hak terhadap peminjam/pengarah.

[3] Mahkamah tidak akan memberikan bantuannya bagi membolehkan responden penggadai menikmati kemungkiran sendiri dengan bergantung pada kemungkiran itu bagi mengelakkan transaksi-transaksi gadaian tersebut dan dengan itu terlepas dari tanggungan di bawahnya jika inilah yang dikehendaki oleh bahasa jelas statut tersebut.

[4] Seksyen 133 bertujuan bagi melindungi sesebuah syarikat, pemegang-pemegang saham dan pemiutang-pemiutang daripada memboroskan sumber-sumbernya secara salah di sisi undnag-undang dan seharusnya diberikan pendekatan secara bertujuan. Mengakui

keharaman sesuatu transaksi perdagangan seperti yang terdapat kini sebagai satu pembelaan, walaubagaimanapun, akan menggagalkan tujuan pentafsiran yang sedemikian, kerana ianya bukan sahaja akan menggagalkan permohonan persatuan pemegang gadaian untuk menguatkuasakan gadaian-gadaian tersebut melalui satu perintah untuk jualan, tetapi akan memberikan "keuntungan besar" kepada syarikat penggadai dan pihak-pihak lain dalam kedudukan yang sama. Kesudahan yang sedemikian akan memberikan kesusahan yang amat sangat ke atas persatuan pemegang gadaian.

[5] Menimbang konteks dan tujuan s. 133(1), dan prinsip-prinsip yang menjadi asas s. 133(5) Akta tersebut, kemungkiran seksyen kecil (1) s. 133 tidak menyebabkan keputusan seperti yang dikatakan oleh syarikat responden. Walaupun diterima bahawa transaksi-transaksi gadaian di sini sememangnya telah memungkiri s. 133(1) Akta tersebut, tidak terdapat akibat-akibat tindakan sivil yang terhasil daripadanya, iaitu, tiada pembatalan atau perbuatan tidak boleh menguatkuasakan terletak kepada pinjaman atau transaksi-transaksi gadaian tersebut. Hakim yang bijaksana di bawah telah dengan jelas gagal untuk mengambilkira maksud sebenar s. 133(1), atau prinsip sedia-ada dalam s. 133(5), dan penghakiman beliau, akibat daripada itu, tidak boleh dipertahankan.

[*Rayuan dibenarkan. Gadaian-gadaian dibenarkan berkuatkuasa dan Mahkamah di bawah diperintah untuk memberi pohonan-pohonan yang dipohon oleh perayu termasuk pohonan-pohonan untuk penjualan hartanah tersebut].*

Cases referred to:
Holman v. Johnson [1775] 98 ER 1120 ***(refd)***
Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 MLJ 356 ***(refd)***
Yango Pastoral Co. Pty Ltd. v. First Chicago Australia Ltd. [1978] 139 CLR 410 ***(foll)***
Coramas Sdn. Bhd. v. Rakyat First Merchant Bankers Bhd. [1994] 1 MLJ 369 ***(refd)***
J.C. Scott Constructions v. Mermaid Waters Tavern Pty. Ltd. [1984] 2 Qd. 413 ***(refd)***
Farrow Mortgage Services Pty Ltd (in liq) v. Edgar and Others [1993] 114 ALR 1 ***(refd)***
Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd. [1990] 2 MLJ 365 ***(ovrd)***
Littlewood v. George Wimpey [1953] 2 All ER 915 ***(refd)***
Victor Battery Co. Ltd. v. Curry's Ltd [1946] Ch. 242 [1946]) 1 AER 519 ***(foll)***
Curtis Furnishings Stores Ltd. v. Freedman [1966] 1 WLR 1219 ***(foll)***
Selangor United Rubber Estates Ltd. v. Craddock (No. 3) [1968] 2 AER 1073, [1968] 1 WLR 1555 ***(cit)***
Heald v. O'Connor [1971] 1 WLR 497 ***(cit)***
Co-operative Central Bank Bhd. v. Syarikat Bukit Tinggi & 18 Others [1991] 1 CLJ 50 ***(affd)***
Corumo Holdings Ltd. & Ors. v. C. Itoh Ltd & Ors. [1990] 3 ACSR 438 ***(foll)***
Kasumu v. Baba Egbe [1956] 3 AER 266 ***(refd)***

Legislation referred to:
Australian Companies Act 1961 s. 125,
Australian Companies Act 1981, ss. 230, 234
Banking and Financial Institutions Act 1989, s. 45(l)
Companies Act 1948 (UK) s. 190
Companies Act 1965 ss. 6, 67, 133(l), (4), (5), 369(l), (a), (2)
Companies Act 1980, (UK) ss. 49 - 52 & 63
Companies Act 1985 (UK), s. 330-334
Co-operative Societies Act 1948 s. 57
National Land Code 1965 ss. 256(3), 257(1), (2), (3)
Uniform Companies Enactment 1961, s. 125

Other sources referred to:

Ford's Principles of Corporations Laws, Professor H.A.J. Ford, 6th Edn., para. 1525, pp. 517, 518

Law of Contract, Greig and Davis, p. 1117ff

Section 67 of the Companies Act: A Hornet's Nest?, Lai Ching Sum, [1992] 2 MLJ xi

Palmer's Company Law

Ford's Company Law, 2nd Edn.

Company Law, Walter Woon, p. 17

Oxford Companion to Law

Australian Company Law, Paterson Ednie and Ford, 3rd Edn. Vol. 2 - Commentary Annotations para. (230/1)

Principles of Modern Company Law, L.C.B. Gower, 5th Edn., p. 237

For the appellant - Vijendran Ponniah (Murali Achan with him); M/s. Vije & Co.

For the respondent - Hira Singh (Asbir Kaur with him); M/s. Asbir Hira Singh & Co.

JUDGMENT

Edgar Joseph Jr. FCJ:

This appeal arises from proceedings by way of originating summonses in the High Court, Seremban, which raised the vexed question of whether there are any civil consequences which flow from a breach of s. 133(l) of the Companies Act, 1965, ("the Act"), upon the validity of two loan and charge transactions registered under the National Land Code, 1965, ("the Code").

To put matters in perspective, the provisions of the Act, which it would be convenient to reproduce are s. 133(l), (4) and (5). The provisions read as follows:

> 133. Loans to directors.
>
> (1) A company (other than an exempt private company) shall not make a loan to a director of the company or of a company which by virtue of s. 6 is deemed to be related to that company, or enter into any guarantee or provide any security in connection with a loan made to such a director by any other person but nothing in this section shall apply:
>
> (a) subject to subsection (2), to anything done to provide such a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the company or for the purpose of enabling him properly to perform his duties as an officer of the company;
>
> (b) to anything done to provide such a director who is engaged in the full-time employment of the company or its holding company, as the case may be, with funds to meet expenditure incurred or to be incurred by him in purchasing or otherwise acquiring a home; or
>
> (c) to any loan made to such director who is engaged in the full-time employment of the company or its holding company, as the case may be, where the company has at a general meeting approved of a scheme for the making of loans to employees of the company and the loan is in accordance with the scheme.
>
> (4) Where a company contravenes this section any director who authorizes the making of any loan, the entering into of any guarantee or the providing of any security contrary to this section shall be guilty of an offence against this Act.
>
> Penalty: Ten thousand ringgit.
>
> (5) Nothing in this section shall operate to prevent the company from recovering the amount of any loan or amount for which it becomes liable under any guarantee entered into or in respect of any security given contrary to this section.

Touching on the background and effect of the Australian equivalent of the Malaysian s. 133, being the Australian Companies Act 1981, s. 234, Professor H.A.J. Ford in his book, *Ford's Principles of Corporations Laws* (6th Edn), has this to say (at para. 1525, pp. 517, 518):

> Companies legislation in s. 232(2) (Malaysian s. 132(l)) states the duty of good faith in very broad terms as a duty to act 'honestly'. One aspect of that duty is to refrain from applying the company's resources otherwise than for the benefit of the company as a whole. In companies legislation there are scattered measures on aspects of that duty. The various measures deal only with limited contexts (for example, s. 232(5) dealing with improper use of company information) in which the duty exists. For such contexts the specific provisions emphasise the basic duty. That legislative emphasis is found in connection with a loan by a company to its director because such a transaction can readily waste a company's resources. Section 234 regulates such loans but in addition to and not in derogation of other law. Presumably, that means that even if a loan is permitted by the legislation, the directors who sanction that loan must consider whether the transaction is for the benefit of the company and not prejudicial to the interests of its creditors.
>
> The legislation stems from a recommendation of the Cohen Committee in the United Kingdom who said that it was undesirable that a director should borrow from the company: if the director could offer good security, it would be no hardship to borrow elsewhere; if good security could not be offered, the director should not borrow from the company. In enacting a strict rule about loans to directors the legislature treats directors like trustees and forbids this form of self-dealing without any provision for the director to be absolved by showing that the particular loan was not prejudicial to the company.
>
> Section 234 forbids, subject to exceptions, a company making a loan to a director or certain other persons, bodies corporate or trusts related to a director. It also forbids the giving of guarantee or the provision of security in connection with another lender's loan to a director or related person or entity.

Bearing in mind the words of Professor Ford, quoted above, we now embark upon a consideration of the vexed question of law, posed by the present appeal, to which we referred at the outset.

For brevity and convenience, we shall refer to the appellant, the Co-operative Central Bank Limited, which was the plaintiff in the Court below, and the respondent, Feyen Development Sdn. Bhd., which was the defendant in the Court below, as "the chargee society" and "the chargor company", respectively, unless the context otherwise requires.

The essential facts, which led up to the litigation in which this appeal arises may be taken in substance from the statement of agreed facts and issues, which was put in at the trial and may be stated thuswise:

At all material times, the chargee society was registered as a co-operative society under the Co-operative Societies Act, 1948, while the chargor company, was a privately incorporated company registered under the Act although not a private exempt company as therein defined and the person said to be the borrower was a certain Lim Kon Kwee ("the borrower"), a member of the chargee society as well as a director of the chargor company.

According to the contemporary documents in the case, the chargee society had lent to the borrower a sum of RM3 million on the security of two charges registered and created under the Code, bearing presentation numbers 8279-83 Jilid 435 Folio 27 and 1447/83 Mid 73 - Folio 66 ('the charges") by the chargor company, over its lands comprised in Grant No. 16397 for Lot 12590, situated in Bandar Seremban, in the State of Negeri

Sembilan and in EMR No. 655, for Lot No. 1519, situated in the Mukim of Ampangan, in the State of Negeri Sembilan ("the lands") respectively, in favour of the chargee society.

In the event, the chargor company having committed default under the charges, the chargee society commenced proceedings, namely, two separate charge actions to wit, Originating Summonses 266/86 and 351/88, praying, *inter alia*, for orders of sale of the lands. On the other hand, the chargor company commenced separate proceedings, being Civil Suit 18/91, praying for declarations that the charges were illegal, void and unenforceable by reason of breach of s. 133(l) of the Act.

Before the learned Judge in the Court below, the chargee society and the chargor company had, through their Counsel, agreed that the sole question for decision in the proceedings hereinbefore mentioned was whether the effect of a breach of s. 133(l) of the Act had any, and if so, what civil consequences with regard to the validity of the charges aforesaid.

In the event, the learned Judge answered this question in favour of the chargor company by holding that it was entitled to the declarations it had prayed for, that is to say, that the charges and the contract of loan for which the charges had been executed by way of security were illegal, void and unenforceable, and he accordingly made the necessary consequential orders for cancellation of the memorials in the register document of title and the issue documents of title, and return of the issue documents of title to the chargor company. It is from the whole of this decision that the chargee society has appealed to this Court.

We note - in passing, only - and without placing undue stress on the point, that although nowhere in the statement of agreed facts and issues was any mention made as to the use, purpose or object of the loan, repayment of which was secured by the charges, there was clear evidence on this point, emanating from the affidavit of a certain Kwan Teck Yang, a co-director and co-subscriber of the borrower, to the memorandum of association of the chargor company wherein by para 2, it was freely admitted:

> It is true the company was given a Ringgit 3 million loan and as security for the said loan, property held under Grant No. 16397 Lot No. 12590 Bandar Seremban and property held under EMR No. 655 Lot 1519 Mukim of Ampangan, Seremban was charged to the plaintiff. The value of these properties was at Ringgit Ten million.

It can therefore be reasonably inferred that at all material times Kwan Teck Yang was fully aware of the purpose, use or object of the loan. Indeed, it is he who, as director of the chargor company, had created the charges on behalf of the chargor company, and it is he who is now attempting to invalidate them on the ground that s. 133(l) had been breached (See pp. 200 and 263 of the appeal record).

Thus, although, on the face of the documents in the case, the borrower was said to be Lim Kon Kwee, it can also be reasonably inferred from the admission in the affidavit of Kwan Teck Yang, (quoted above), that the loan of RM3 million was ultimately received by the chargor company, and, as we have said, it is the chargor company which is now seeking, to avoid the charges by seeking refuge in s. 133 of the Act. Thus, there is no question here of the assets of the chargor company being depleted through misuse. Indeed, the position is quite the opposite; the chargor company is, in reality, seeking to avoid repayment of a loan it had obtained and, at the same time, to get back its lands free of the charges. But, this is a Court of law and not a Court of morals, so that if the chargor company is correct in its contentions on the law, it is entitled to succeed.

For the avoidance of doubt, we hasten to add, that since it was agreed in the Court below that the charge transactions had breached s. 133(l) of the Act and, it was on this basis, that the learned Judge had conducted and decided the case, we should do likewise.

It is obvious that s. 133 of the Act does not in terms say that a guarantee entered into or any security given in contravention thereof is to be void although this would result in the imposition of criminal liability on the official of the company concerned, and on the company itself, by virtue of the general penalty provisions contained in s. 369(l)(a) and s. 369(2) of the Act.

Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. (See *Holman v. Johnson* [1775] 98 ER 1120 at 1121; *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] 1 MLJ 356.) However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute. This point was aptly put by Gibbs CJ in *Yango Pastoral Co. Pty Ltd. v. First Chicago Australia Ltd.* [1978] 139 CLR 410 thuswise:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a **general rule**, but for complete accuracy it needs qualification, because **it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable.** However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. **Where a statute imposes a penalty upon the making or performance of a contract, it is question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.** (Emphasis supplied)

In *Coramas Sdn. Bhd. v. Rakyat First Merchant Bankers Bhd.* [1994] 1 MLJ 369 at 378, a case where the validity of a contract entered into in breach of s. 45(l) of the Banking and Financial Institutions Act, 1989 was in question, we had occasion to quote with approval the above passage in the judgment of Gibbs CJ.

We have also read with much profit the judgment of McPherson J in *J.C. Scott Constructions v. Mermaid Waters Tavern Pty. Ltd.* [1984] 2 Qd. 413.

We note that Greig and Davis on the *Law of Contract*, at pp. 1117 ff, say that they see a trend in decisions whereby Courts are now less ready to find a contract illegal or unenforceable simply by reason of a statutory provision.

And, we also note that in *Farrow Mortgage Services Pty Ltd (in liq) v. Edgar and Others* [1993] 114 ALR 1, the following principles of illegality were enunciated by the Court, (Lockhart, Gummow and Lee JJ) (at pp. 9 and 10):

> In his article *"Restitutionary Recovery of Benefits Conferred under Contracts in Conflict with Statutory Policy - The New Golden Rule"* (1987) 25 Osgood Hall LJ 787 at 788-9, Professor McCamus describes the 'continued and remarkable growth of regulation in the modern era' as having created an environment which is rather different from that in which

a the English Courts formulated the approach of common law to illegality in contract; the commission of any offence then was perhaps more likely a signal of significantly anti-social conduct than it is today.

The learned author also points out that when agreements have been entered into which create a conflict with the letter or the spirit of a regulatory legislative scheme, two problems emerge for resolution by the law of private obligations. The first concerns the validity of b the agreement itself. The second concerns the secondary consequences for the parties, and third parties, if the agreement is indeed held to be unenforceable or void. Statute may render the agreement unenforceable without being void but, if void, it must, of necessity, be unenforceable: see *Lejo Holdings Pty Ltd v. Deutsche Bank (Asia) AG* [1988] 2 Qd R 30 at 41.

In Australia, the relevant principles, as settled, are largely to be found in the expositions c in the judgments in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410; 21 ALR 585. Counsel for both sides accepted that this was so. We have also been much assisted by the judgment of McPherson J in *JC Scott Constructions v. Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 cited by the respondents.

And, in *Yango*, (*ibid*) Mason J (as he then was) said (at p. 429):

There is much to be said for the view that once a statutory penalty has been provided for d an offence the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished - see my judgment in *Jackson v. Harrison* ([1978] 138 CLR 438, at p. 452). See also the suggestions that the principle cannot apply to all statutory offences (*Beresford v. Royal Insurance Co. Ltd.* in the Court of Appeal ([1937] 2 K.B. 197, at p. 220), per Lord Wright; *Marles v. Philip Trant & Sons Ltd.* ([1954] 1 Q.B. 29, at p. 37); per Denning LJ, and that would be a curious thing if the offender is to be punished twice, civilly as well as criminally (*St. John Shipping Corporation v. Joseph* e *Rank Ltd.* ([1957] 1 QB 267, at 292), per Devlin J). The main considerations from which the principle *ex turpi causa* arose can be seen in the reluctance of the Courts to be instrumental in offering an inducement to crime or removing a restraint to crime: *Beresford's* case ([1938] AC, at pp. 586, 599); *Amicable Society v. Bolland* (*Fauntleroy's* case ([1830] 4 Bligh (N.S.) 194, at p. 211 (5 ER 70, at p .76)).

However, in the present case Parliament has provided a penalty which is a measure of the f deterrent which it intends to operate in respect of non-compliance with s. 8. In this case it is not for the Court to hold that further consequences should flow, consequences which in financial terms could well far exceed the prescribed penalty and could even conceivably lead the plaintiff to insolvency with resultant loss to innocent lenders or investors.

It is with the above general principles in mind that we must now consider, in greater detail, the vexed question of law aforesaid.

g

In *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1990] 2 MLJ 365, a third party charge, created in favour of a lender as security for an illegal loan granted by the lender to a director of the chargor company, was held by Chan J (as he then was) to be void and unenforceable for breach of the prohibition imposed by s. 133(l) of the Act. In so holding, his Lordship relied heavily on an array of English and h Australian decisions.

In a well researched article entitled "*Section 67 of the Companies Act: A Hornet's Nest*?" by Miss Lai Ching Sum, reported in [1992] 2 MLJ xi, criticism has been levelled against Chan J for his "wholesale importation and adoption", in *Che Wan* of Australian and English authorities, passages in *Palmer's Company Law* and an Australian textbook, namely, *Ford's Company Law* (2nd Ed).

i

Section 67 of the Act provides:

67. Dealing by a company in its own shares, etc.

(1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.

(2) Nothing in subsection (1) shall prohibit -

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, or a subsidiary of the company including any director holding a salaried employment or office in the company or a subsidiary of the company, or

(c) the giving of financial assistance by a company to persons, other than directors, *bona fide* in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) If there is any contravention of this section, the company is, notwithstanding s. 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or one hundred thousand ringgit.

(4) Where a person is convicted of an offence under subsection (3) and the Court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court.

(5) The power of a Court under s. 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) of this section from the liability to have such an order made against him.

(6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

Miss Lai has gone on to make the following general observation - the soundness of which cannot be doubted:

Without in any way doubting the wisdom and worth of foreign authorities as an aid for statutory interpretation if the relevant provisions are in *pari materia* with the Malaysian provisions, it is respectfully submitted that where the actual wording of a Malaysian statute differs from a foreign statute, albeit similar, greater scrutiny of the Malaysian statute is

> required notwithstanding the availability and assistance of foreign authorities to ensure an accurate and meaningful construction of the local statute.

And, more particularly, directing attention to the differences between s. 67 of the Act and the comparative legislation in England and Australia, she has added - persuasively, if we may say so - :

> The writer respectfully submits that although the Malaysian s. 67 is substantially similar in wording to the former English and Australian provisions, there are two material differences. Firstly, the prohibition under both the English and Australian provisions was so complete that the company itself was made a party to the offence, whereas under the Malaysian provision, only the officers of the company and not the company are guilty of the offence.
>
> Secondly, neither the Australian nor the English statutes have an equivalent provision to the Malaysian s. 67(6). Section 67(6) reads:
>
> > Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of this section.
>
> These differences are material because they suggest that a prohibited transaction may not be totally devoid of legal effect. Thus, English and Australian authorities which held that a prohibited transaction was void for being illegal must be carefully read in this perspective.

However, when it comes to s. 133 of the Act, an examination of the comparative legislation in the Australian Companies Act 1961 s. 125, 1981 s. 230, the United Kingdom 1948 s. 190, 1985 ss. 330-334, reveals that there **are** provisions there equivalent to our s. 133(5). Indeed, our sub-ss. (4) and (5) (reproduced *supra*) are taken from the equivalent Australian section.

It is certainly arguable - and persuasively so - that sub-section 5 of s. 133 of the Act implies that notwithstanding that a guarantee or security given by a company may have contravened s. 133(l), the company may incur civil liability under it, in which case it will have a right of recourse against the director/borrower. To quote Mr. Walter Woon in his book on *Company Law*, at p. 17, when referring to the Singapore equivalent (s. 162(5)) of our s. 133(5), he pertinently asks: " How can the company be liable under the guarantee or security unless they are valid and enforceable against it ?".

In *Littlewood v. George Wimpey* [1953] 2 AER 915, at 921, Lord Denning LJ (as he then was) thought that "liable" denotes that "... a person is responsible at law." Similarly, the *Oxford Companion to Law*, explaining the word "liability" says: "a person is said to be under a liability when he is, or at least may be, legally obliged to do or suffer something."

Referring to the comparative legislation in Australia, to wit, Australian Companies Act 1981 s. 230, (previously s. 125 of the 1961 Uniform Companies Enactments), the concept of which was imported from s. 190 of the Companies Act, 1948, of the United Kingdom, (later repealed and replaced in far more extensive and stringent form by the Companies Act, 1980, (UK) ss. 49 to 52 and 63), Paterson Ednie and Ford in their work on *Australian Company Law*, 3rd Ed. Vol. 2 - Commentary Annotations - para (230/1) under the sub-heading "Introduction" dated 2 September 1988, pertinently state - and we agree - that "In so far as this section enables the company to recover moneys in respect of a security, it is evidently designed with the decision in *Victor Battery Co. Ltd. v. Curry's Ltd* [1946] Ch. 242 [1946] 1 AER 519, in mind."

We would remark, in passing, that in *Victor Battery*, it was held that a mortgage of a company's assets was valid and enforceable although it was given as security for a loan to the company which the lender knew would be used to assist someone to acquire shares in the company. This decision was followed by Cross J in *Curtis Furnishings Stores Ltd. v. Freedman* [1966] 1 WLR 1219 though it was doubted in *Selangor United Rubber Estates Ltd. v. Craddock* (No. 3) [1968] 2 AER 1073 at 1153; [1968] 1 WLR 1555 at 1646, and disapproved and not followed in *Heald v. O'Connor* [1971] 1 WLR 497.

It goes without saying that if - and indeed, we so hold - that the principle in *Victor Battery* has been statutorily recognised in s. 133(5) of the Act, then the fact that it has been held to be wrong or described as "heretical" by Mr. L.C.B. Gower in his book "*Principles of Modern Company Law*" (5th Edn. p. 237), would not matter, so far as our Courts are concerned, for it would be their duty to give effect to the will of Parliament as expressed in the law.

We note that in *Co-operative Central Bank Bhd. v. Syarikat Bukit Tinggi & 18 Others* [1991] 1 CLJ 50 in considering the question whether an alleged breach of s. 133(l) of the Act, had the civil consequences of rendering a charge transaction void and unenforceable, the High Court, Penang, declined to follow *Che Wan* on the ground that it was decided *per incuriam* in that Chan J had overlooked:

(i) Section 57 of the Co-operative Societies Act which says that the provisions of the laws for the time being in force relating to trade unions, associations, societies and companies, shall not apply to societies registered under the Co-operatives Societies Act, the plaintiff there being such, and also

(ii) the effect of s. 133(5) of the Act, as explained by Mr. Walter Woon in his book on *Company Law*, quoted above.

With great respect, in our view, s. 57 of the Co-operative Societies Act, merely exempts a co-operative society registered under the Co-operative Societies Act from compliance with the requirements of the Act. In other words, s. 57 does not prevent a company from relying on s. 133 of the Act **by way of defence**, to proceedings brought against it by a co-operative society, for enforcement of a security given in connection with a loan made by the co-operative society to a director of such company or of a company which, by virtue of s. 6 of the Act, is deemed to be related to such company, assuming, for, the sake of argument, a breach of s. 133(l) has the civil consequence of invalidating the transaction concerned.

However, we respectfully agree that the effect of s. 133(5) of the Act is of direct relevance to the question whether a breach of s. 133(l) of the Act has the civil consequences contended for by Counsel for the chargor company. It would be more convenient if we revert to the case of *Co-operative Central Bank*, in the concluding stages of this judgment.

In the meanwhile, to return to *Che Wan*, a perusal of Chan J's judgment shows that there was a reference in it to s. 133(5) of the Act but he did not address the question whether s. 133(5) of the Act is a statutory emanation of *Victor Battery* and, if it is, what are the consequences which flow therefrom. So far as relevant to this part of the case, this is what he said:

> It can be seen at once that ss. 67(6) and 133(5) are similar in terms to s. 230(7) of the Australian Companies Code 1981. What is said in *Ford, Company Law* (4th Ed, 1986) at p. 405 (which I have referred to earlier in reference to s. 230(7) of the Australian Companies Code 1981) should be equally applicable to s. 133(5) of our Companies Act 1965. As

pointed out in Ford, the subsection only applies to the company's right to take action against an errant director without being met by the defence that the transaction is prohibited by statute and is illegal and therefore void. It does not affect any defence of illegality available to the company if it were sued on a transaction entered into in breach of it, thus making the transaction unenforceable against the company.

The subsection does not apply if the company were to sue to recover what it had given as guarantee or security to the person who had made a loan to a director of the company so that it would not preclude the defence that because the transaction is tainted with illegality the Courts should not assist the company.

In this judgment, I am only concerned with s. 133 of the 1965 Act although any decision on this section concerning the validity of transactions prohibited by the section would be equally applicable to s. 67 of the Act.

Section 133 prohibits a company from the making of loans to its directors as well as the entry into any guarantee or the provision of any security in connection with a loan to a director of the company by another person. And s. 67 prohibits a company from giving financial assistance to its directors (or, where it is a subsidiary, to a director of its holding company) for the purchase of its shares.

Any agreement made in breach of any of the prohibitions in s. 67 or s. 133 of the Act is illegal, so as to expose the company's officers to penalties. Although s. 67 and s. 133 do not expressly say that the prohibited transactions are void, this necessarily follows from the fact that the prohibited transactions are made illegal by the Act by subjecting the officers of the company to penalties: *Heald v. O'Connor; Dressy Frocks v. Bock* at p. 393 decided under the Australian Uniform Companies Act 1961, s. 67; see also *Ford, Company Law* (2nd Ed, l978), at p. 180. In *Heald v. O'Connor*, Fisher J has held that the debenture in that case was prohibited by statute and for that reason was illegal and therefore void. It follows, therefore, that any transaction which has contravened any of the prohibitions in s. 67 or s. 133 of the Act is illegal and therefore void.

In the result, I find that the third party charge which was created by the plaintiff company in favour of the defendant co-operative society to secure an illegal loan made by the co-operative society to a director of the plaintiff company was illegal and therefore void and unenforceable by the co-operative society as it had contravened the prohibition in s. 133 of the Companies Act 1965 on this type of transaction.

I therefore grant the declaration that was sought.

The plaintiff company has also sought an order for the cancellation of the registration of the charge on its lands and also for the return of all documents of title.

The only Australian case where *Che Wan* was considered was *Corumo Holdings Ltd. & Ors. v. C. Itoh Ltd & Ors.* [1990] 3 ACSR 438 where Rogers CJ refused to follow it.

In *Corumo*, the Court was concerned with a tripartite joint venture agreement and the validity of loans granted to a joint venture vehicle. Corumo and the guarantors of the loans contended that they had established breaches of s. 230 of the Companies (NSW) Code 1981 and that in the result a Syndicated Credit Facility Agreement was void and unenforceable, subject to s. 8(8), which provides that "relevant interest" in a share "shall be disregarded" if the "relevant interest" is that of a trustee and the trustee is a bare trustee. It was further contended that an associated bank guarantee was void and unenforceable on the same ground.

At the end of the day, Rogers CJ did not find it necessary to rule on whether the impugned transactions had offended s. 230 because, even assuming that they did, the breaches were "highly technical" and so did not result in the loans transaction being rendered void or unenforceable.

In so holding, Rogers CJ applied a purposive interpretation to s. 234 of the Australian companies legislation. He pointed out that the purpose of s. 234 was to protect the company, its shareholders and creditors from having its assets misused for the benefit of directors and interests associated with directors. He recognised that whilst it would frustrate Parliament's intention to restrict the scope of s. 234, it would he equally unjust to invoke the section to commercial transactions free from the taint of misapplication of the companies resources, which the section was aimed at preventing.

In adverting to *Che Wan*, Rogers CJ observed that the result arrived at in that case, would defeat Parliament's purpose as explained above. He added: "I would suggest that it hardly protects a company from having its assets misused to disable it from recovering its money by enforcing guarantees it had obtained."

He also made the pertinent observation at p. 448, which we respectfully endorse, that "a commercial Judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community"

The appeal (see [1991] 5 ACSR 720) based on s. 230 was dismissed. On the basic issue of whether there had been a contravention of s. 230(l)(a), (iiia) and (iv), the Supreme Court of New South Wales (Kirkby P, Samuels and Meagher JJA) held there had been no contravention of s. 230 on the ground that a complete defence was available by reason of s. 8(8) on the basis that "the relevant interest" in the shares was held under a bare trust, which had to be disregarded for purposes of s. 230.

Meagher JA was of the view that applying a purposive approach to s. 230(l)(a), "a loan ought not to attract the prohibition if the director in question has a merely hypothetical, theoretical or notional control of the moneys". On a further ground also he arrived at the conclusion that there had been no contravention of s. 230. He did so, by applying a literal approach to s. 8(8) hereinbefore mentioned, which provided a complete defence.

Nevertheless, Meagher JA did criticize parts of the reasoning of Rogers CJ on the ground that he "had applied the principles on which he relied too broadly." This is how he put it (at pp. 749, 750):

> His Honour the trial Judge, while arriving at the same conclusion as those which have reached did so by a somewhat different route. He did not find it necessary to come to any conclusion as to whether or not there had been a breach of s. 230. His Honour found that the appellants were endeavouring to take advantage of 'highly technical breaches' of the section the purpose of which was 'to avoid corporate abuses of a kind which are totally absent here'. In these circumstances, his Honour held that even assuming the existence of the breaches alleged, no voidness or unenforceability would attach to the loans, because by his view of the scope of the doctrine of illegality currently espoused by the superior Courts. One must sympathise with this approach. The alleged breaches were "technica1" in the extreme. Since the purpose of the section was the protection of the lending company, and its shareholders and creditors, it can hardly be conducive to the furtherance of that purpose to deprive the lending company of its apparent rights against the guarantors of its loans. Not even the forensic skills of Counsel for the appellants extended to a submission that any of their clients had any merits on the s. 230 issue. And, as I say, his Honour undoubtedly came to the right conclusion. But with the greatest respect to him, I think his Honour applied the principles on which he relied somewhat too broadly. There is no doubt that the general rule is that where a statute expressly prohibits a transaction and stipulates for penalties for those entering into it, such a transaction will be void and unenforceable. That principle is at least as old as *Holman v. Johnson* [1775] 1 Cowp. 341 at 343; 98 ER 1120 at 1121, and see *King v. Licensing Court Brisbane*; *Ex parte Daniel* [1920] 28 CLR 23 at 30. However, exceptionally in some cases, such a result may not ensue, bearing in

> mind the context and purpose of the statutory prohibition. Thus, for example, in *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd* [1978] 139 CLR 410; 21 ALR 585 the High Court of Australia held that a transaction entered into in violation of s. 8 of the Banking Act 1959 (Cth) was neither void nor unenforceable. This latter conclusion will the more readily be drawn where to declare a contract void and unenforceable would harm one of the class of persons for whose benefit the statutory provision was made: *Cunningham v. Cannon* ([1983] 1 VR 641 at 646 per King J. A recognition of the strength of those exceptional cases, however, in my view does not solve the present problem. It could hardly be contended that no contract, however blatantly in breach of s. 230, was void or unenforceable. If, for example, there were a contract of loan between JC No 100 and Mr. Stapleton, or between SA and Mr. Inomata, could it seriously be denied that it was both void and unenforceable? And would not that defect remain even if, in all the circumstances, it was found to be on balance beneficial for the lender? One would have to find some doctrine which resulted in the conclusion that some contracts in breach of the section were void and others not; or, alternatively, that the section had the effect of avoiding the provisions of such a contract in so far as they imposed burdens on the lending company but not in so far as they conferred benefits. There is, in my view, no such doctrine of intermittent unilateral voidness known to our law. It therefore becomes necessary in a case such as the present to inquire whether or not a breach of the section, technical or otherwise, has been committed; and in my view such an inquiry eventually leads in this case to the conclusion that it has not.
>
> The appeal by Corumo should therefore be dismissed with costs.

In our view, to admit the defence of illegality, to a commercial transaction of the present sort, would defeat a purposive interpretation of sub-sections (1) and (5) of s. 133 of the Act which is designed for the protection of the company, its shareholders and creditors from unlawful dissipation of its resources.

We would go further and say that to admit the defence of illegality to defeat the chargee society's application to enforce the charges by way of an order for sale, would, in the words of Mason J (as he then was) in *Yango Pastoral* (at p. 428), provide "a windfall gain" to the chargor company and others in a similar position. In consequence, such a result would impose substantial hardship upon the chargee society for, in the words of Gibbs C.J. in *Yango Pastoral*, (at p. 415, para 1):

> ... if a body corporate were unable to recover money that it has lent, it would be disabled from performing its own obligations, including those owed to its depositors. In those circumstances the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute *(Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.* ([1961] 1 QB, at p. 390); *Dalgety and New Zealand Loan Ltd. v. V.C. Imeson Pty. Ltd.* ([1963] 63 SR (NSW) 998, at p. 1004).

This Court will not be astute to lend its aid to enable the chargor company to take advantage of its own default or wrong by relying on its own breach to avoid the charge transactions and thereby escape its obligations thereunder, unless this is what the clear language of the statute is thought to require (see, for example, *Kasumu v. Baba Egbe*, [1956] 3 AER 266, 271 I to 272 A).

But, to apply s. 133 to the present charge transactions so as to produce a result which would exempt the chargor company from the obligations incurred by it thereunder would be tantamount to applying it to commercial transactions which were free from the taint of corporate abuse which the section was designed to counter. However, we repeat, this is not a Court of morals but a Court of law and, if the Counsel for the chargor company is correct in his contentions, he is entitled to succeed.

Fortunately, in our view, sub-section (5) of s. 133 enables us to hold that a breach of sub-section (1) of s. 133 does not have the result contended for by Counsel for the chargor company, for the reasons hereinbefore mentioned. The case of *Co-operative Central Bank Bhd. v. Syarikat Bukit Tinggi* was, therefore, rightly decided by Mohamed Dzaiddin J (now a Federal Court Judge) in favour of the chargee, on the ground of the effect of sub-section (5) of the Act. It follows, therefore, that the case of *Che Wan* was wrongly decided.

To summarise, our conclusion is that accepting that the charge transactions did breach s. 133(l) of the Act, no civil consequences flowed therefrom, that is to say, no voidness or unenforceability attached to the loan or the charge transactions, regard being had to the context and purpose of s. 133(l), and especially the principle underlying s. 133(5), as explained above, which regrettably the learned Judge failed to take into account or to give proper weight to, with the result that his judgment cannot stand.

This appeal therefore succeeds, the judgment of the Court below is set aside, the charges must be enforced, no cause to the contrary having been shown within the meaning of s. 256(3) of the Code. We accordingly restore and remit the originating summonses concerned to the High Court, Seremban, with a direction to grant the prayers therein, including the prayers for sale of the lands and to make such further or other consequential orders and directions as are required under s. 257(l), (2) and (3) of the Code.

The chargor company must pay to the chargee society, the costs of the proceedings both here and in the Court below. The deposit paid into Court by way of security for costs of the appeal will, of course, have to be refunded.